I am satisfied on the authority of the decision in *Munns* v. *Longden*,[5] that fresh evidence cannot be introduced at the hearing of a motion to set aside an *ex-parte* order made in chambers.

For the reasons stated above, I hold that the defendant has shown reasonable cause why the seizure of the immovable property of the defendant by attachment before judgment should be set aside and I order accordingly with costs to the defendant.

Order granted.

Solicitors: *Arulanandom & Co.; P. P. Dharmananda.*

HII CHING CHAI v. HII TAI TUONG

[A.C.J. (Lee Hun Hoe J.) June 3, 1965]
[Sibu — Civil Revision No. 2 of 1965]

Practice and Procedure — Trial — Hearing before different magistrates — Whether magistrate has power to continue civil case part heard by another magistrate.

In this case the case was originally heard by a magistrate who heard one witness and adjourned the hearing. Subsequently a second magistrate continued the hearing and heard three witnesses and then adjourned the hearing. A third magistrate then took over, heard a witness for the defendant and gave judgment for the plaintiff.

Held: there is nothing in the Subordinate Courts Ordinance or rules made thereunder to permit a succeeding magistrate to continue hearing of civil cases on evidence taken and recorded by his predecessor. The judgment must be set aside and a new trial ordered.

Case referred to:—

(1) *Chua Chee Chor* v. *Chua Kim Yong* [1960] M.L.J. 127 and [1963] M.L.J. 17 P.C.

CIVIL REVISION.

Lee Hun Hoe J.: This is a revision under section 11 of the Subordinate Courts Ordinance and section 33 of the Courts of Judicature Act, 1964. This case has an unfortunate history. Three magistrates had each dealt with part of the case. On 9th December, 1964 one magistrate heard a witness and adjourned the hearing when plaintiff informed him that his witness was sick. On 25th January, 1965 a second magistrate continued with the hearing and heard three witnesses and adjourned the hearing further to enable the defendant to call his son as a witness. On 15th April, 1965 a third magistrate took over and heard the defendant's son and gave judgment for plaintiff with costs.

Needless to say such practice is highly irregular and undesirable. Under section 206 of the Criminal Procedure Code where a change of magistrate occurs in a trial or inquiry the succeeding magistrate may act on the evidence recorded by his predecessor or he may hear the case *de novo*. The relevant section reads:—

"206. Whenever any magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and who exercises such jurisdiction, the magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:

Provided that—

(a) in any trial the accused may, when the second magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and heard; and

(b) the High Court may, whether there be an appeal or not, set aside any conviction and or commitment made on evidence not wholly recorded by the magistrate before whom the conviction was had or the commitment made, if such court is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial."

It is clear that the provisions apply to criminal cases only. No similar provisions could be found anywhere in our law to enable a succeeding magistrate to act on the evidence recorded by his predecessor in civil cases.

In *Chua Chee Chor* v. *Chua Kim Yong* [1] the Judicial Committee of the Privy Council pointed out the grave doubts of Thomson C.J. (as he then was) as to the regularity of the unusual course taken by the judge in acceding to the wishes of the parties that he "should give judgment on evidence as recorded by his predecessor." Although it was held that the evidence had been "taken and recorded" by the judge within the meaning of section 75 of the Trengganu Civil Procedure Code, which applied alike to civil and criminal cases, and, further the hearing was being "continued" before the judge, the course adopted was considered undesirable and a precedent not to be followed. Several cases were referred to their Lordships both in the Privy Council and in the Court of Appeal. I do not think I need mention these cases here.

There is nothing in the Subordinate Courts Ordinance or rules made thereunder to permit a succeeding magistrate to continue hearing of civil cases on evidence taken and recorded by his predecessor. In this case the magistrate had no power to continue hearing a part heard civil case. Unless and until steps are taken to amend the law relating to civil matters magistrates have no alternative but to hear such cases *de novo*.

Accordingly I set aside the judgment and order a new trial to be heard before another magistrate.

New trial ordered.